No. 82-1554

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., PETITIONERS

v.

DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT (UNIT B)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether a defendant is constitutionally entitled to a new trial on account of his attorney's asserted ineffectiveness in failing to investigate and present certain evidence at trial, without demonstrating that the additional evidence probably would have affected the outcome of the trial.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	7
Argument:	
Introduction	9
I. Where a claim of ineffective assistance of counsel is based on counsel's alleged failure to investigate and develop evidence to be presented at trial, the defendant must demonstrate that the evidence probably would have affected the outcome of the proceedings	12
A. The court of appeals correctly held that a showing of prejudice is an essential element of an ineffective assistance of counsel claim	12
B. Relief cannot be granted unless the Court finds that counsel's failure to investigate certain matters and produce evidence at trial probably affected the outcome of the proceedings	18
II. The distinct question of whether the attorney's performance fell measurably below the range of competence demanded of defense counsel should be judged, as a threshold matter, by an objective standard	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Armstrong v. *State*, 429 So.2d 287	10
Barclay v. *Florida*, No. 81-6908 (July 6, 1983)	25
Baumann v. *United States*, 692 F.2d 565	17
Berry v. *State*, 10 Ga. 511	20
Brooks v. *Tennessee*, 406 U.S. 605	13

Cases—Continued: Page

Chambers v. *Maroney*, 399 U.S. 42 12
Chapman v. *California*, 386 U.S. 18 13
Cooper v. *Fitzharris*, 586 F.2d 1325, cert. denied, 440 U.S. 974 ..... 13, 14, 15, 16
Cuyler v. *Sullivan*, 446 U.S. 335 ..... 12, 16
Eddings v. *Oklahoma*, 455 U.S. 104 ..... 10, 11
Engle v. *Isaac*, 456 U.S. 107 ..... 7, 10, 13, 15, 16, 17, 24, 28
Estelle v. *Williams*, 425 U.S. 501 ..... 14, 27, 28
FTC v. *Grolier, Inc.*, No. 82-372 (June 6, 1983) 27
Geders v. *United States*, 425 U.S. 80 12
Gideon v. *Wainwright*, 372 U.S. 335 ..... 12, 13
Hallman v. *State*, 371 So.2d 482 20
Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) .. 8, 27, 28, 29
Henry v. *Mississippi*, 379 U.S. 443 21
Herring v. *New York*, 422 U.S. 853 13
Hickman v. *Taylor*, 329 U.S. 495 27
Holloway v. *Arkansas*, 435 U.S. 475 13
Jackson v. *Denno*, 378 U.S. 368 26
Jones v. *Barnes*, No. 81-1794 (July 5, 1983) 14
Jones v. *Jago*, 701 F.2d 45 28
Knight v. *State*, 394 So.2d 997 ..... 5, 6
Lockett v. *Ohio*, 438 U.S. 586 ..... 10, 24
Matthews v. *United States*, 518 F.2d 1245 29
McMann v. *Richardson*, 397 U.S. 759 ..... 14, 26, 27, 29
Mesarosh v. *United States*, 352 U.S. 1 20
Mills v. *United States*, 281 F.2d 736 19
Morris v. *Slappy*, No. 81-1095 (Apr. 20, 1983) 12, 14
Pickens v. *Lockhart*, No. 82-1836 (8th Cir. Aug. 12, 1983) 17, 23
Polk County v. *Dodson*, 454 U.S. 312 29
Powell v. *Alabama*, 287 U.S. 45 ..... 14, 29
Smith v. *Phillips*, 455 U.S. 209 17
Smith v. *State*, 400 So.2d 956 20
Songer v. *State*, 365 So.2d 696 10
Stone v. *Powell*, 428 U.S. 465 27
Thomas v. *State*, 374 So.2d 508, cert. denied, 445 U.S. 972 20
Townsend v. *Sain*, 372 U.S. 293 16
United States v. *Agurs*, 427 U.S. 97 ..... 8, 15, 17, 20, 22, 23, 25

Cases—Continued: Page

United States v. *Alessi*, 638 F.2d 466 19
United States v. *Ash*, 413 U.S. 300 29
United States v. *Atkins*, 545 F.2d 1153 21
United States v. *Atkinson*, 297 U.S. 157 16
United States v. *Barlow*, 693 F.2d 954 19
United States v. *Bujese*, 371 F.2d 120 21
United States v. *Burns*, 668 F.2d 855 19
United States v. *Cotner*, 657 F.2d 1171 19
United States v. *Cronic*, cert. granted, No. 82-660 (Feb. 22, 1983) 9, 10, 18
United States v. *Decoster*, 624 F.2d 196, cert. denied, 444 U.S. 944 ..... 6, 13, 15, 21, 23
United States v. *Diggs*, 649 F.2d 731, cert. denied, 454 U.S. 970 19
United States v. *Eldred*, 588 F.2d 746 21
United States v. *Frady*, 456 U.S. 152 ..... 7, 10, 12, 15, 16, 17, 23, 24
United States v. *Green*, 680 F.2d 183, cert. denied, No. 82-5552 (Feb. 22, 1983) 15
United States v. *Herman*, 614 F.2d 369 19
United States v. *Iannelli*, 528 F.2d 1290 21
United States v. *Johnson*, 327 U.S. 106 ..... 19, 20
United States v. *Mangieri*, 694 F.2d 1270 19
United States v. *Martorano*, 663 F.2d 1113, cert. denied *sub nom. Goldenberg* v. *United States*, No. 81-1389 (Feb. 28, 1983) 19
United States v. *Morrison*, 449 U.S. 361 12
United States v. *Oliver*, 683 F.2d 224 19
United States v. *Provenzano*, 620 F.2d 985, cert. denied, 449 U.S. 899 21
United States v. *Swarek*, 677 F.2d 41, cert. denied, No. 82-175 (Jan. 10, 1983) 19
United States v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982) 15, 23
Wainwright v. *Sykes*, 433 U.S. 72 ..... 14, 16, 19, 21, 23, 28
Washington v. *State*, 362 So.2d 658 ..... 2, 4, 9
Zant v. *Stephens*, No. 81-89 (June 22, 1983) 11

Constitution, statutes and rules: Page

U.S. Const.:
Amend. V (Due Process Clause) 22
Amend. IV 27
Amend. VI 7, 9, 13, 14, 17, 21
Act of Apr. 30, 1790, ch. 9, Section 29, 1 Stat. 118 11
18 U.S.C. 3005 11
28 U.S.C. 2255 16
Fla. Stat. Ann. (West 1973):
Section 921.141(5)(a) 4
Section 921.141(5)(b)-(g) 4
Section 921.141(5)(c) 4
Section 921.141(5)(d) 4
Section 921.141(5)(e) 4
Section 921.141(5)(f) 4
Section 921.141(5)(g) 4
Fed. R. Crim. P.:
Rule 33 ..... 16, 19, 20
Rule 52(b) 16
Fla. R. Crim. P.:
Rule 3.590(c) 20
Rule 3.600 20
Rule 3.600(a)(3) 20

Miscellaneous:

58 Am. Jur. 2d *New Trial* §§ 166-173 (1971) 20
Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 Va. L. Rev. 927 (1973) 27
D. Graham & T. Waterman, *A Treatise on the Law of New Trials* (2d ed. 1855):
Vol. 1 ..... 19, 21
Vol. 3 ..... 19, 20, 21
8A J. Moore, *Moore's Federal Practice* (2d ed. 1982) 16, 19, 20
Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 Stan. L. Rev. 1 (1978) 15
3 C. Wright, *Federal Practice and Procedure* (2d ed. 1982) 19, 20, 21

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INTEREST OF THE UNITED STATES

Claims of ineffective assistance of counsel are raised with increasing frequency in federal criminal cases, and the principles laid down in this case are likely to govern the disposition of such claims.

STATEMENT

1. Respondent pleaded guilty in Florida state court to three counts of murder in the first degree and related charges in connection with three brutal killings in late September 1976. First, according to a prearranged plan, an accomplice induced Daniel Pridgen, a minister, to engage in homosexual activities in the latter's apartment. Respondent entered the apartment after Pridgen was undressed and in bed. While the accomplice covered Pridgen's face with a pillow and held him helpless, respondent stabbed Pridgen 11 times. Respondent and the accomplice then searched for money in Pridgen's apart-

ment, painted slogans on the wall to suggest that the killing was the work of a homosexual lover, wiped their fingerprints from surfaces, and stole some jewelry, a small amount of cash, and Pridgen's car (J.A. 28-30, 51, 83-87, 111-147, 155-161).

Three days later, respondent went to the residence of Katrina Birk, where her three elderly sisters-in-law were visiting while her husband was in the hospital. When, after a period of surveillance, he observed that the four women were together in one room, respondent entered the house and bound the women. When he saw Mrs. Birk inching toward the kitchen, respondent shot her in the head and repeatedly stabbed her, causing her death. He then shot the other victims in the head, stabbed them, and fled with a small amount of money. One of the sisters-in-law remained comatose as a result of knife wounds and subsequently died, and another was permanently blinded (J.A. 33-38, 87-92, 162-182, 189-218, 223-236).

Four days after the murder of Mrs. Birk, respondent contacted Frank Meli, a 20-year old college student, in response to Meli's newspaper advertisement offering a car for sale. Pursuant to a preconceived plan, respondent persuaded Meli to go to respondent's home to obtain the purchase money. Once inside, respondent bound Meli to a bed. Respondent subsequently sold Meli's car and forced him to telephone his family to request a ransom. Three days after the kidnapping, respondent stabbed Meli 11 times while he was tied to the bed and a companion covered his face wtih a pillow. Respondent then went to an intersection where he had arranged to pick up the ransom money, but left after determining that the police were watching the area. Respondent disposed of the proceeds of the sale of Meli's car by buying a motorcycle, paying off his accomplices, entertaining himself at the dog track, and, apparently, giving some money to his wife (J.A. 39-48, 65-66, 92-100, 146-147, 237-310). See *Washington* v. *State*, 362 So. 2d 658, 660-661 (Fla. 1978).

2. a. On October 1, 1976, following the arrest of his companions in the Meli case, respondent surrendered to police. After being advised of his rights and choosing to speak without the presence of an attorney, respondent gave a detailed confession to the Meli murder. Attorney William Tunkey, who had extensive experience in more than 500 criminal cases (J.A. 424), was appointed to represent him. Tunkey was regarded by the state sentencing judge as "highly competent" (J.A. 54; see also J.A. 448) and by the judge who presided at the state collateral proceedings as "one of the leading criminal defense attorneys in Dade County" (Pet. App. A216). While he was in jail on the Meli charges, respondent was informed that he was suspected of having committed the Pridgen and Birk murders as well. Respondent initially denied the accusations. But after being informed that an accomplice had told police about the murders, respondent, against Tunkey's advice (J.A. 22, 24), chose to speak to police without the presence of an attorney and confessed in detail to the murders.

On December 1, 1976, again against Tunkey's advice, respondent pleaded guilty to all of the charges. Respondent acknowledged at the guilty plea hearing, as he had in his confession (J.A. 200-202), that he had committed a string of burglaries and had been selling stolen merchandise to the Birks (J.A. 37). Respondent also admitted that he planned to kill Pridgen before he entered the apartment (J.A. 51). He stated, however, that he did not at first intend to kill Mrs. Birk or Meli, and that he was in financial difficulty because he was out of a job and his wife had just had a baby (J.A. 36, 50-53, 65-66). Respondent also stated that he could not have had a better lawyer than Tunkey, but that he did not believe there was any basis on which Tunkey could contest the charges (J.A. 54-56). See 362 So. 2d at 662; J.A. 24-25, 140-144, 152-153, 387, 399, 400.

b. Following a sentencing hearing, the court sentenced respondent to death on each of the first degree murder convictions. The court found four statutory aggravating

factors present in all three murders, concluding that each was (i) "especially heinous, atrocious, or cruel," (ii) "committed for pecuniary gain," (iii) committed while respondent was engaged in another violent crime (robbery, burglary, or kidnapping), and (iv) committed for the purpose of avoiding or preventing arrest. Fla. Stat. Ann. § 921.141(5)(d), (e), (f) and (g). The court also found in the Birk case that respondent knowingly had created a great risk of death to many persons by stabbing and shooting Mrs. Birk's sisters-in-law. Fla. Stat. Ann. § 921.141(5)(c). See 362 So. 2d at 662-664.

Tunkey urged as statutory mitigating circumstances that respondent had no significant history of prior criminal activity, that he was acting under the influence of extreme mental or emotional disturbance, and that he was 26 years of age (J.A. 334). See Fla. Stat. Ann. § 921.141(5)(a), (b) and (g). In addition, Tunkey urged the court to consider that respondent had surrendered to police, confessed his culpability, voluntarily entered guilty pleas, offered to testify against his accomplices, and not tried to escape following his arrest (J.A. 335-336). The court, however, explicitly found no statutory mitigating factor for any of the murders[1] and held that any other mitigating circumstances were insufficient to outweigh the aggravating circumstances. 362 So.2d at 663-664. The Florida Supreme Court affirmed these holdings and upheld the sentences (*id.* at 665-667), and this Court denied certiorari (441 U.S. 937 (1979)).

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[1] The court noted that respondent had admitted to engaging in a course of burglaries and dealing in stolen property, thereby rendering inapplicable the statutory factor of an absence of prior criminal activity. The court also found that respondent was not acting under extreme mental or emotional disturbance and that his ability to conform his conduct to the law was not substantially impaired; that the victims had not participated in or consented to the acts; that respondent's participation in the crimes was not insignificant; and that his age could not be considered in mitigation, especially in view of his acts in planning and perpetrating the crimes and disposing of the proceeds. Fla. Stat. Ann. § 921.141(5)(b)-(g). See 362 So.2d at 662-664.

3. Respondent then filed a motion for post-conviction relief in state court, contending that Tunkey had rendered ineffective assistance. The state court held that in order to obtain relief under controlling Florida precedent, respondent had to prove (i) "a substantial and serious deficiency measurably below that of competent counsel," and (ii) "a likelihood that the deficient conduct affected the outcome of the court proceedings" (Pet. App. A213-A214, quoting *Knight* v. *State*, 394 So. 2d 997, 1000-1001 (Fla. 1981)). The court observed that the aggravating circumstances in this case were "simply overwhelming" and that respondent did not contend that Tunkey was ineffective in failing to rebut them or in failing to present evidence of any statutory mitigating circumstances (Pet. App. A216-A218).

Respondent did contend, however, that Tunkey was ineffective in not conducting an investigation of certain *nonstatutory* mitigating factors: his allegedly difficult childhood, lack of a job, new baby, and need for money. The court concluded, however, that many of these considerations in fact had been made known to the sentencing judge and that, in any event, none of Tunkey's alleged failings constituted a serious deficiency because various circumstances suggested valid tactical grounds for his actions (Pet. App. A224, A226, A228, A229-A230). The court further found "beyond any doubt" that "there is not even the remotest chance that the outcome would have been any different" if Tunkey had taken the measures respondent identified (*id.* at A231). The Florida Supreme Court unanimously affirmed the trial court's findings and denial of relief (*id.* at A248-A250).

4. Respondent then sought habeas corpus relief in the United States District Court for the Southern District of Florida. After a hearing, the district court denied relief (Pet. App. A253-A295). The court concluded that Tunkey had made an error of judgment in not conducting an investigation of family, friends and medical experts (*id.* at A282-A283). But the court found that there was not "a likelihood, or even a significant possibility that the

balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in [respondent's] favor" if Tunkey had done so (*id.* at A286). "Critically," the court observed, "the character and medical testimony cannot reasonably be characterized as evidence of extreme mental or emotional disturbance"—the relevant statutory mitigating factor—and does not "provide persuasive rationalization for [respondent's] extended and calculated course of violence" (*ibid.*).

5. A divided en banc court of appeals vacated and remanded for further proceedings (Pet. App. A1-A205). The court noted that although the district court concluded that Tunkey committed an error of judgment, it stopped short of finding him ineffective (*id.* at A16). The court of appeals believed that Tunkey might have made a legitimate tactical decision to introduce limited character evidence at the plea colloquy and thereafter to rely on expressions of frankness, sincerity, and remorse—a course that would have made extensive investigation into respondent's background unnecessary (*id.* at A24-A28). The court therefore remanded for further proceedings on the question whether Tunkey had made such a legitimate tactical choice (*id.* at A54-A55, A81-A82).

The court of appeals made clear that, in order to obtain relief, respondent also would have to demonstrate some degree of prejudice by showing that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." If respondent carried this burden, the State then could attempt to show that the error was harmless beyond a reasonable doubt (Pet. App. A75-A76). In formulating this test, the court declined to follow the decision of the District of Columbia Circuit in *United States* v. *Decoster*, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944 (1979), and the Florida Supreme Court's decision in *Knight* v. *State*, *supra*, which require the defendant to demonstrate a likelihood that counsel's errors had an effect on the outcome of the proceedings (Pet. App. A71-A72).

SUMMARY OF ARGUMENT

A claim of ineffective assistance of counsel has two necessary and independent elements: (1) proof that the attorney's performance fell measurably below the range of competence demanded of defense counsel, and (2) a showing that substantial prejudice resulted. In this case, relief must be denied for failure to satisfy the prejudice element, without regard to whether counsel performed in a reasonably competent manner.

I

A. The requirement that prejudice be shown in order to obtain relief on a claim of ineffective assistance of counsel is solidly grounded in this Court's precedents. Sixth Amendment cases in which the Court has reversed convictions without a specific inquiry into prejudice are readily distinguishable, because they involved either a total denial of counsel or restraints on counsel's independence and undivided loyalty that are essential attributes of the Sixth Amendment guarantee. In addition, where, as here, a claim of ineffective assistance of counsel is raised on collateral attack, a requirement that prejudice be shown is compelled by the "cause and actual prejudice" standard of *Engle* v. *Isaac*, 456 U.S. 107 (1982), and *United States* v. *Frady*, 456 U.S. 152 (1982).

B. The nature of the prejudice inquiry may vary depending upon the particular type of error counsel is accused of having committed. In this case, there is a readily available standard particularly adapted to respondent's claim. Because the failing identified by respondent is that additional evidence should have been presented by his attorney at trial, the appropriate showing of prejudice is the one universally accepted as necessary to obtain a new trial on the basis of newly discovered evidence: that the evidence would probably result in an acquittal (or, here, in a sentence of life imprisonment). While it may be appropriate in ineffective assistance cases to waive the customary requirement that such evidence must be shown

not to have been discoverable prior to trial in the exercise of due diligence, there is no reason—at least in the ordinary, non-capital case—why the quantum of prejudice required for relief should be relaxed.

Even if a lesser showing were thought appropriate because of a special sensitivity in capital cases, it at least would be necessary for the defendant to show that the new evidence creates a reasonable doubt about the validity of the judgment that did not previously exist. Cf. *United States* v. *Agurs*, 427 U.S. 97, 112-113 (1976). Relief must be denied here even under this standard, because the state courts found "beyond any doubt" and "to the point of a moral certainty" that there was no likelihood of an effect on the outcome if Tunkey had done the things respondent suggests (Pet. App. A231, A250), and the district court also found no likelihood that the outcome would have been altered if he had done so (*id.* at A286). No colorable basis exists for overturning those conclusions.

II

Whether an attorney's errors caused his performance to fall measurably below the range of competence demanded of attorneys in criminal cases should be determined, at least as an initial matter, in objective terms. If the defendant asserts that counsel committed legal errors, the defendant first should be required to show that the legal right involved was clearly established at the time of counsel's actions (cf. *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982)) and was of substantial importance to the outcome of the case. By the same token, where, as here, the defendant asserts that counsel should have investigated certain matters and thereby produced additional evidence at trial, the defendant should be required to satisfy a comparable threshold burden by showing that such an investigation was equivalent, in its degree of obviousness and likelihood of proving fruitful, to the vindication of a clearly settled legal right that was of substantial importance in the case.

ARGUMENT

Introduction

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." In this case, as in *United States* v. *Cronic*, cert. granted, No. 82-660 (Feb. 22, 1983), the explicit Sixth Amendment guarantee was satisfied: respondent had the assistance of William Tunkey, "one of the leading criminal defense attorneys in Dade County" (Pet. App. A216). Respondent nevertheless contends that the assistance Tunkey rendered was constitutionally inadequate. He of course does not maintain that Tunkey was ineffective in failing to establish his innocence. Respondent voluntarily gave detailed confessions to the murders and, against Tunkey's advice, pleaded guilty to them. Respondent does contend, however, that Tunkey rendered ineffective assistance in connection with the sentencing phase of the case. It is useful to place this claim in perspective under the Florida capital sentencing procedure.

There is no suggestion that Tunkey could have rebutted the existence of any of the statutory aggravating circumstances the state trial and supreme courts found with respect to each murder, since respondent's detailed confessions and guilty pleas effectively conceded the factual basis for each of those aggravating circumstances. Moreover, the sentencing judge found no statutory mitigating circumstances in any of the murders (362 So.2d at 662-664), and, on collateral attack, the state courts and federal district court all held that the additional evidence respondent now contends Tunkey should have explored would not have shown the existence of any statutory mitigating circumstances (Pet. App. A217-A218, A248-A250, A276, A286). Respondent's claim therefore is that Tunkey was ineffective because he did not develop evidence in support of arguments in mitigation that are not specifically listed in the statute but that, he contends, might have influenced the sentencing judge. While the

defendant is entitled to have nonstatutory mitigating circumstances considered (*Lockett* v. *Ohio*, 438 U.S. 586 (1978)), a claim resting solely on such factors is considerably attenuated, because it is the statutory mitigating factors—entirely absent here—that are the principal ones to be taken into account under state law. See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978); *Armstrong* v. *State*, 429 So. 2d 287, 288-289 (Fla. 1983). Cf. *Eddings* v. *Oklahoma*, 455 U.S. 104, 114-115 (1982). Accordingly, in light of the overwhelming aggravating circumstances present in this case, the state courts and federal district court properly rejected respondent's collateral attack on his sentence—unless respondent was entitled to relief even though correction of his attorney's alleged omissions could not have affected the outcome of the proceeding. We submit that relief is not available in such circumstances.

As we explain in *United States* v. *Cronic* (U.S. Br. at 32-33, 35, 47 and Apps. B and C (No. 82-660, 1983 Term)), the federal courts of appeals generally have identified (albeit it in varying terms) two necessary and independent showings that must be made in order to obtain relief on the basis of ineffective assistance of counsel. The defendant must show (1) that his attorney committed significant errors that caused his performance to fall measurably below the range of competence demanded of defense counsel, and (2) that he was prejudiced as a result. Like the "cause" and "actual prejudice" standards for obtaining relief on collateral attack on a claim not raised at trial, the two prongs of the ineffective assistance of counsel test are in the conjunctive, and relief therefore must be denied if the defendant fails to satisfy either. Compare *Engle* v. *Isaac*, 456 U.S. 107, 134-135 & n.43 (1982), with *United States* v. *Frady*, 456 U.S. 152, 168, 175 (1982). And as with the "cause" and "actual prejudice" standards, there is no particular order in which the range-of-competence and prejudice elements of an ineffective assistance of counsel claim must be explored. Because, in our submission, respondent cannot prevail even if his attorney's performance was defective, since

any defects could not have affected the outcome of the sentencing proceeding, we believe it was unwarranted for the court of appeals to remand for further inquiry into the range-of-competence element of respondent's claim. Similarly, there should be no need for this Court to pass upon that complex question in this case.[2]

Finally, we suggest that any temptation to deal broadly and abstractly with the general subject of ineffective assistance of counsel should be resisted. The content of the "prejudice" and "range-of-competence" components of such claims may well vary depending upon the type of dereliction with which counsel is charged. In this case, attention is best focused upon the particular type of claim asserted, *i.e.*, the failure of counsel to adduce additional evidence. As we argue below, that type of alleged defect in counsel's performance cannot justify setting aside the result of the trial unless a sufficient probability is demonstrated that the outcome of the proceeding would have been affected if the additional evidence had been developed.[3]

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[2] We endorse the analysis in Judge Hill's dissenting opinion regarding this point (Pet. App. A195-A203).

[3] Two other characteristics of this case that could influence the Court's analysis should be noted. First, although the court of appeals did not believe that different standards were applicable here because this is a capital case (Pet. App. A21-A22 n.12), it seems to us entirely possible that the evaluation of respondent's claim would be affected by that factor. Such a view has been endorsed in other contexts by this Court (see, *e.g.*, *Zant* v. *Stephens*, No. 81-89 (June 22, 1983), slip op. 22; *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-112 (1982)), and it is certainly arguable that capital cases demand special efforts by counsel and special sensitivity by courts to the impact of counsel's actions. Cf. 18 U.S.C. 3005 (derived from Section 29 of the Act of Apr. 30, 1790, ch. 9, 1 Stat. 118), which provides for two attorneys for defendants in capital cases. Second, this case involves a challenge only to the sentence, and not to the underlying conviction. Because resentencing is generally less burdensome than retrial, the government's interest in the finality of its judgments may weigh less heavily in this context.

For the reasons discussed in the text (see pages 25-26, *infra*), however, any special weight that might be given to these two factors

I. WHERE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS BASED ON COUNSEL'S ALLEGED FAILURE TO INVESTIGATE AND DEVELOP EVIDENCE TO BE PRESENTED AT TRIAL, THE DEFENDANT MUST DEMONSTRATE THAT THE EVIDENCE PROBABLY WOULD HAVE AFFECTED THE OUTCOME OF THE PROCEEDINGS

A. The Court Of Appeals Correctly Held That A Showing Of Prejudice Is An Essential Element Of An Ineffective Assistance Of Counsel Claim

The court of appeals was correct in holding that a finding of substantial prejudice is required in order for a court to grant relief on a claim of ineffective assistance of counsel, although the court erred in its formulation of the prejudice element (see pages 23-24, *infra*). As respondent concedes, the requirement of a showing of prejudice "is solidly grounded in this Court's precedent" (Br. in Opp. 13). Under *United States* v. *Morrison*, 449 U.S. 361, 365 (1981), if asserted defects in defense counsel's performance did not have an "impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding." See also *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970); *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9-10; *id.* at 12-13 (Brennan, J., concurring). And under *United States* v. *Frady*, where, as here, the defendant raises matters on collateral attack that were not presented at trial, he must demonstrate "actual prejudice" to obtain relief. 456 U.S. at 168. Although respondent appears to concede the point, we undertake a brief discussion of the prejudice requirement for the light it sheds on the *nature* of the showing of prejudice required.

1. This Court's decisions in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Geders* v. *United States*, 425 U.S. 80 (1976); and *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), do not suggest that a showing of prejudice is unnecessary

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is insufficient to support the result reached by the court of appeals in the circumstances shown by the record of this case.

in an ineffective assistance of counsel case. The action of the state in imprisoning a convicted defendant who has been totally denied counsel in violation of *Gideon* is so fundamentally incompatible with basic fairness that courts will not conduct an inquiry into whether the outcome of the trial was affected by the absence of counsel in the particular case (Pet. App. A58, citing *Chapman* v. *California*, 386 U.S. 18, 43 (1967) (Stewart, J., concurring)). No comparable state action is involved when the claim is that the lawyer who was provided was, through no fault of the state, ineffective.

In *Geders* and related cases, such as *Herring* v. *New York*, 422 U.S. 853 (1975), and *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), the government affirmatively interfered with the relationship between attorney and client or with counsel's freedom of action in conducting the defense, both of which are essential attributes of the assistance of counsel guaranteed by the Sixth Amendment. Similarly, a finding that counsel labored under an actual conflict of interest that adversely affected his performance establishes that the attorney did not adhere to the duty of undivided loyalty to his client that also is an essential attribute of the Sixth Amendment guarantee. Because of the subtle but pervasive effect of conflicting loyalties upon an attorney, an inquiry into what prejudice resulted may be little more than "unguided speculation." *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978). See also Pet. App. A57-A60; *United States* v. *Decoster*, 624 F.2d at 201 (plurality opinion of Leventhal, J.); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331-1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

Cases involving allegations that an attorney who was unencumbered by such inhibitions upon his independence and loyalty nonetheless made a mistake in his handling of the case are materially different. "Every trial presents a myriad of possible claims," and it is virtually inevitable that counsel in any given case will overlook or choose to omit certain claims while pursuing others. *Engle* v. *Isaac*, 456 U.S. at 128-129 & n.34, 133-134. No funda-

mental unfairness results when this occurs, and the Court has made clear that the Constitution does not require that counsel recognize and raise every potentially meritorious claim. *Id.* at 134; *Wainwright* v. *Sykes*, 433 U.S. 72, 91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976); *id.* at 514-515 (Powell, J., concurring); cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983). Only if counsel's errors were of sufficient magnitude to undermine the fairness of the proceedings—*i.e.*, only if they were equivalent in their severity to an actual denial of the "Assistance of Counsel" to which the Sixth Amendment explicitly refers—is a Sixth Amendment violation established.[4]

Nor does an inquiry into whether prejudice resulted require "unguided speculation," as in the conflict of interest cases. A claim of ineffective assistance of counsel necessarily is based on identifiable acts or omissions by the attorney that the defendant asserts reasonably competent counsel would not have committed. Pet. App. A61; *Cooper* v. *Fitzharris*, 586 F.2d at 1331; *Morris* v. *Slappy*, slip op. 12-13 (Brennan, J., concurring). A reviewing court can assess the probable impact of those errors in the proceedings, just as courts routinely assess the impact of other errors that the defendant does *not* attribute to the incompetence of his attorney.

Moreover, as the court of appeals observed (Pet. App. A64), a requirement that prejudice be shown is appropriate in ineffective assistance of counsel cases because

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[4] In our brief in *United States* v. *Cronic* (U.S. Br. 25-30, 33-34), we discuss in some detail the historical evolution of the judicially fashioned right to "effective" assistance of counsel, beginning with *Powell* v. *Alabama*, 287 U.S. 45 (1932), and explain why claims of a Sixth Amendment violation based on assertedly incompetent assistance of counsel must be comparable in their level of severity to an actual denial of counsel. We also explain in that brief (U.S. Br. 34) why this Court's decision in *McMann* v. *Richardson*, 397 U.S. 759 (1970), supports this position, and identify (U.S. Br. 16-25) a number of other considerations that further reinforce this conclusion. We will not repeat that discussion here.

neither the prosecution nor the court is responsible for the alleged defects in the proceedings. This conclusion would seem to follow a fortiori from cases such as *United States* v. *Agurs*, 427 U.S. 97, 111 (1976), and *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 7, 10, 14-15; *id.* at 2, 5 (O'Connor, J., concurring), in each of which the Court considered the prejudicial impact on the outcome of the proceedings even though the government *was* responsible for the deficiency. See also *United States* v. *Green*, 680 F.2d 183, 188-189 (D.C. Cir. 1982), cert. denied, No. 82-5552 (Feb. 22, 1983); *Decoster*, 624 F.2d at 214 (plurality opinion). Where there has been no arguable government misconduct, setting aside a conviction without a showing of prejudicial impact on the outcome of the proceedings therefore cannot be justified on the ground that it would deter constitutional violations; to do so would simply bestow a windfall on a defendant who was not injured by counsel's conduct.

2. The requirement of a concrete showing of prejudice has particular force where, as here, the ineffective assistance of counsel claim is raised in a collateral attack on the conviction. If counsel fails to take certain actions at trial, the substantive defects in the proceedings that result from counsel's failure may be raised on collateral attack only if the defendant satisfies the "cause" and "actual prejudice" standards of the line of cases culminating with *Engle* v. *Isaac* and *United States* v. *Frady*. If a lesser showing were required for ineffective assistance of counsel claims, the convicted defendant would be encouraged to raise his substantive claims indirectly rather than forthrightly, recasting them as attacks on his attorney's performance in causing the trial error or allowing it to go uncorrected. See Pet. App. A67-A68; *Decoster*, 624 F.2d at 207 (plurality opinion); *Cooper* v. *Fitzharris*, 586 F.2d at 1333; Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 Stan. L. Rev. 1, 60-61 (1978). Such an approach would vitiate the cause-

and-prejudice standard. It also would improperly deflect the court's attention from the central question on collateral review— whether there was fundamental unfairness to the accused in light of the error that assertedly occurred at trial [5]—to a more peripheral concern with the lawyer's actions and thought processes in connection with that error and, all too frequently, a separate trial of the attorney's performance.[6]

It is also significant in this case that there is no constitutional requirement that the State furnish an opportunity to present new evidence on the question of guilt or sentence for a defendant whose judgment of conviction has become final. As a result, a state prisoner cannot obtain federal habeas corpus relief on the basis of newly discovered evidence unless that evidence bears upon the constitutionality of his detention. *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963).[7] Requiring a state prisoner to show substantial prejudice in order to obtain habeas corpus relief on the basis of such evidence when its absence at trial is attributed to errors by counsel serves

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[5] *Engle* v. *Isaac*, 456 U.S. at 134; *Wainwright* v. *Sykes*, 433 U.S. at 90-91. Cf. *Cuyler* v. *Sullivan*, 446 U.S. at 343, 348.

[6] Similar considerations arise on direct appeal in the federal system. If the particular issue was not raised in the trial ocurt, the conviction may be set aside on appeal only upon a finding of plain error affecting substantial rights. Fed. R. Crim. P. 52(b). This remedy is available only in exceptional circumstances, in order to avoid a miscarriage of justice. *United States* v. *Frady*, 456 U.S. at 163 & nn.13 & 14; *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). In those few cases in which a claim of ineffective assistance of counsel might be considered on direct appeal because the claim does not turn on matters outside the record, to dispense with the prejudice element would mean that the strict standard used to review issues raised for the first time on direct appeal could be circumvented by couching the issue as an ineffective assistance of counsel claim. See *Cooper* v. *Fitzharris*, 586 F.2d at 1333.

[7] Collateral relief likewise is not available under 28 U.S.C. 2255 on the basis of newly discovered evidence; such a claim must be brought within two years under Fed. R. Crim. P. 33. See 8A J. Moore, *Moore's Federal Practice* ¶ 33.02[3][a], at 33-12 to 33-13 (2d ed. 1982).

to ensure that nonconstitutional newly discovered evidence claims are not too readily transformed into Sixth Amendment ineffective assistance of counsel claims in order to obtain collateral relief. See, *e.g.*, *Baumann* v. *United States*, 692 F.2d 565, 578-581 (9th Cir. 1982).

Quite aside from this potential for circumvention, there is no basis in law or logic for dilution of the "actual prejudice" requirement where the defendant attacks his lawyer's performance. The governmental interest in enforcing procedural rules to maintain the finality of a judgment of conviction is as weighty when defense counsel could be regarded as blameworthy for not complying with those rules as it is when counsel could not be faulted by his client or a neutral observer (because, for example, he made a reasonable tactical choice). Cf. *Agurs*, 427 U.S. at 110; *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982). Indeed, it is self-evident that the efficacy of contemporaneous objection rules and like principles governing the conduct of criminal prosecutions depends on the premise that a party to litigation and his attorney are to be regarded as one, and the "actual prejudice" requirement clearly applies where the failure to raise an issue at trial is attributable to counsel. See, *e.g.*, *Engle* v. *Isaac* and *United States* v. *Frady*, *supra*. While a claim of attorney incompetence, if substantiated, arguably might satisfy (or excuse) the requirement of showing "cause" for the procedural default (see, *e.g.*, *Pickens* v. *Lockhart*, No. 82-1836 (8th Cir. Aug. 12, 1983) (slip op. 23)), it is utterly illogical to permit it to have any bearing on the "actual prejudice" component of the test.

This case implicates a principle of both criminal and civil litigation that is even more fundamental than contemporaneous objection and like procedural rules: that all relevant evidence should be presented by the parties at the trial itself, and that a judgment entered at the close of the evidence therefore should not lightly be disturbed simply because additional evidence has become available to one of the parties. This principle likewise

does not lose its force whenever the party seeking relief from the judgment chooses to blame his attorney for the failure to produce the evidence at the time of trial. Accordingly, a valid judgment should not be set aside in such circumstances absent a showing of substantial unfairness or prejudice to the accused that outweighs the interest in finality.

B. Relief Cannot Be Granted Unless The Court Finds That Counsel's Failure To Investigate Certain Matters And Produce Evidence At Trial Probably Affected The Outcome Of The Proceedings

1. We have argued above (see pages 15-16, *supra*) and in our brief in *United States* v. *Cronic* (U.S. Br. 18, 22, 32, 34, 46-47) that a court considering an ineffective assistance of counsel claim should focus on the nature of the particular defect in the proceedings that is said to have resulted from counsel's assertedly inadequate performance. This is so because the ultimate inquiry must be into whether the *accused* received a fair trial in light of any errors that were caused or uncorrected by counsel, not the performance of the *lawyer* in its own right. Accordingly, the showing of prejudice that must be made in any given case should be determined, at least in the first instance, by reference to the showing of prejudice that would be required to obtain relief from the particular substantive defect in the proceedings that is alleged to have resulted from counsel's actions.

In this case, the trial defect alleged by respondent is that additional evidence should have been presented on a particular issue—the possible mitigation of sentence. American courts long have agreed upon a set of principles to be applied in determining whether a valid judgment should be set aside when one of the parties proffers new evidence relevant to an issue in the original proceedings. Those principles embody a virtually unanimous consensus regarding the appropriate balance to be struck between enforcing the fundamental principle

that the trial itself is the "decisive and portentous event" [8] at which the parties are to present all relevant evidence on the issues in the suit, and yet providing a safety valve to prevent an obvious injustice when new evidence has come to light after judgment has been entered.[9] We submit that this deeply entrenched consensus also is the proper source of guidance in fashioning the standard of prejudice here.

The essential elements for obtaining a new trial on the basis of newly discovered evidence are: (1) the evidence is in fact newly discovered and was unknown to the defendant at the time of trial; (2) failure to learn of the evidence at the time of trial was not the result of a lack of due diligence; (3) the evidence is material to the issues at trial, and is not merely cumulative or impeaching; and (4) the evidence probably would produce an acquittal in the event of a retrial. These requirements are uniformly followed by the federal courts of appeals with respect to new trial motions under Fed. R. Crim. P. 33 [10] and are generally applied by state courts, includ-

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[8] *Wainwright* v. *Sykes*, 433 U.S. at 90.

[9] *United States* v. *Johnson*, 327 U.S. 106, 112 (1946); see also 1 D. Graham & T. Waterman, *A Treatise on the Law of New Trials* 4-9 (2d ed. 1855); *id.*, Vol. 3, at 805, 1016, 1020-1021, 1026-1027, 1043-1044, 1085-1086; 8A *Moore's Federal Practice*, *supra*, ¶ 33.03[1], at 33.17; 3 C. Wright, *Federal Practice and Procedure* § 557, at 315 (2d ed. 1982).

[10] *United States* v. *Mangieri*, 694 F.2d 1270, 1285 (D.C. Cir. 1982); *United States* v. *Martorano*, 663 F.2d 1113, 1119 (1st Cir. 1981), cert. denied *sub nom. Goldenberg* v. *United States*, No. 81-1389 (Feb. 28, 1983); *United States* v. *Alessi*, 638 F.2d 466, 479 (2d Cir. 1980); *United States* v. *Herman*, 614 F.2d 369, 371 (3d Cir. 1980); *Mills* v. *United States*, 281 F.2d 736, 738 (4th Cir. 1960); *United States* v. *Burns*, 668 F.2d 855, 859 (5th Cir. 1982); *United States* v. *Barlow*, 693 F.2d 954, 966 (6th Cir. 1982); *United States* v. *Oliver*, 683 F.2d 224, 228 (7th Cir. 1982); *United States* v. *Swarek*, 677 F.2d 41, 43 (8th Cir. 1982), cert. denied, No. 82-175 (Jan. 10, 1983); *United States* v. *Diggs*, 649 F.2d 731, 739 (9th Cir.), cert. denied, 454 U.S. 970 (1981); *United States* v. *Cotner*, 657 F.2d 1171, 1173 (10th Cir. 1981).

ing those of Florida.[11] 8A J. Moore, *Moore's Federal Practice* ¶ 33.03[1], at 33-18 to 33-19 (2d ed. 1982); 3 C. Wright, *Federal Practice and Procedure* § 557, at 315, 317-328 (2d ed. 1982); 58 Am. Jur. 2d *New Trial* §§ 166-173 (1971). See *Agurs*, 427 U.S. at 111 & n.19; *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956); *United States* v. *Johnson*, 327 U.S. at 110 n.4.[12] The elements of the test for obtaining a new trial on the basis of newly discovered evidence often are traced to the opinion of the Supreme Court of Georgia more than a century ago in *Berry* v. *State*, 10 Ga. 511 (1851).[13] But in fact even in 1855 a leading treatise observed that these elements, "founded on solid reasons of utility as well as justice," were "so clear and well settled, that courts scarcely ever need to doubt or hesitate as to their application." 3 D. Graham & T. Waterman, *supra*, at 1021.

It is the fourth element of the newly discovered evidence test set forth above—that the evidence probably would produce an acquittal in the event of a retrial—that

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[11] Fla. R. Crim. P. 3.600(a)(3) provides that a new trial may be granted if "new and material evidence, that if introduced at the trial would probably have changed the verdict or finding of the court, and that the defendant could not with reasonable diligence have discovered and produced upon the trial, has been discovered." See also *Thomas* v. *State*, 374 So.2d 508, 515 (Fla. 1979), cert. denied, 445 U.S. 972 (1980).

[12] Strict time restrictions also typically are imposed on such motions. See, *e.g.*, Fed. R. Crim. P. 33 (2 years). Under Fla. R. Crim. P. 3.600, a motion for a new trial on the basis of newly discovered evidence must be made within 10 days after the verdict or finding of the court. Fla. R. Crim. P. 3.590(c). After that period has elapsed, the only available judicial remedy is a writ of error coram nobis, under which the defendant must *conclusively* establish that the newly discovered evidence would have changed the result. See, *e.g.*, *Smith* v. *State*, 400 So.2d 956 (Fla. 1981); *Hallman* v. *State*, 371 So.2d 482 (Fla. 1979). See also *United States* v. *Johnson*, 327 U.S. at 112 (referring to the 60-day period then allowed in federal cases as an "extraordinary" length of time).

[13] See *United States* v. *Johnson*, 327 U.S. at 110 n.4; 8A *Moore's Federal Practice*, *supra*, ¶ 33.03[1], at 33-18 n.4; 3 C. Wright, *supra*, ¶ 557, at 315-316.

in our view defines the showing of prejudice required in an ineffective assistance of counsel case based on counsel's alleged failure to investigate and produce evidence. This requirement is essentially the equivalent of the standard announced by the District of Columbia Circuit in *Decoster*—another case involving an alleged failure to investigate—that the defendant must demonstrate "a likelihood that counsel's inadequacy affected the outcome of the trial" (624 F.2d at 208 (plurality opinion)).

New trial rules, like other procedural rules governing the conduct of criminal prosecutions, historically have regarded the accused and his attorney as one. Consistent with this principle, relief has been denied if the attorney knew of the evidence at the time of trial but the accused did not, or if the attorney could be charged with a lack of due diligence in failing to discover or produce the evidence at the time of trial.[14] Under Sixth Amendment doctrine, however, there now may be "exceptional" circumstances [15] in which actions by counsel so depart from the range of competence and standards of fairness that define the scope of the agency relationship established by law between the defendant and his attorney in a criminal case that the defendant should not be bound by his attorney's defaults. Accordingly, where an attorney's performance in investigation and use of evidence falls measurably below the range of competence demanded of defense counsel, it may be appropriate to dispense with the usual rule in this area that the client is bound by his attorney's lack of due diligence or knowledge of facts

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[14] See 1 D. Graham & T. Waterman, *supra*, at 192-193; *id.*, Vol. 3, at 1025-1026, 1029-1030, 1035, 1105-1106; 3 C. Wright, *supra*, § 557, at 317, 327-329; *United States* v. *Provenzano*, 620 F.2d 985, 997 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Eldred*, 588 F.2d 746, 753 (9th Cir. 1978); *United States* v. *Atkins*, 545 F.2d 1153, 1154 (8th Cir. 1976); *United States* v. *Iannelli*, 528 F.2d 1290, 1292-1293 (3d Cir. 1976); *United States* v. *Bujese*, 371 F.2d 120, 125 (3d Cir. 1967).

[15] See *Wainwright* v. *Sykes*, 433 U.S. at 91 n.14, quoting *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965).

that were not produced at trial. The effect of doing so would simply be to excuse the defendant from satisfying those elements of the newly discovered evidence test that are intended to ensure that the party seeking relief is not himself at fault for failing to produce the evidence at trial.

It is clear, however, that excusing the defendant who raises an ineffective assistance of counsel claim from satisfying the due diligence element of the newly discovered evidence test—on the ground that the client should not be charged with his attorney's serious defaults—furnishes no basis for also dispensing with the distinct requirement that the defendant show that the additional evidence he proffers after judgment probably would produce a different result on retrial. This element is not concerned with the relative fault of the parties. It protects the core interests in repose and finality by assuring that a valid judgment of conviction will not lightly be set aside simply because additional evidence has become available, *irrespective* of the fault of the party seeking relief. Cf. *Agurs*, 427 U.S. at 110.

To be sure, the *Agurs* Court declined to adopt the newly discovered evidence standard in determining when evidence in the possession of the prosecutor was sufficiently material that the Due Process Clause required its disclosure to the defense. But the Court's rationale was that "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." 427 U.S. at 111. That rationale has no application here, because there is no suggestion that the prosecution was responsible in any way for the unavailability of the evidence. Indeed, respondent does not even rest his claim for relief on the availability of new evidence from a "neutral source." A necessary element of his ineffective assistance of counsel claim is that the evidence was available or should have been available to his attorney, a participant in the *defense*.

A fortiori, the logic of *Agurs* does not support a departure from the newly discovered evidence test here.

2. The court of appeals in this case specifically declined to follow *Decoster* and to formulate the prejudice element in terms of whether counsel's failure to produce evidence had a likely effect on the outcome, because it believed that such a formulation would require respondent to carry a greater burden than that imposed under the "actual prejudice" standard for raising claims on collateral attack. Drawing on language from *United States* v. *Frady* (456 U.S. at 170), the court instead stated that respondent must show that counsel's performance resulted in "actual and substantial disadvantage to the course of his defense." Pet. App. A75. If this burden were met, the State then could show that any error that occurred was harmless beyond a reasonable doubt. *Id.* at A76. The court's reasoning was seriously flawed.

Contrary to the court of appeals' belief, the phrase "actual and substantial disadvantage," which the court drew from *Frady*, itself indicates that the inquiry cannot be divorced from the fundamental fairness of the proceedings or the accuracy of the judgment. See, *e.g.*, *Pickens* v. *Lockhart*, *supra*, slip op. 22, 23-25. Indeed, the Court in *Frady* twice stressed that there was no "substantial likelihood" that the jury would have reached a different result if it had not been given the instruction about which Frady belatedly complained. 456 U.S. at 172, 174. Similarly, in *Wainwright* v. *Sykes*, upon which the court of appeals also relied in rejecting the *Decoster* approach (see Pet. App. A71), the Court considered the "actual prejudice" element in terms of whether admission of the inculpatory statement at issue had a likely effect on the jury's verdict. 433 U.S. at 91.[16] The Court also has made clear that the nature of

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[16] In *United States* v. *Valenzuela-Bernal*, also relied upon by the court of appeals (see Pet. App. A69, A73-A74), the Court again stressed the importance of finding a "reasonable likelihood" that the evidence could have affected the outcome. Slip op. 15; see also *id.* at 9, 15 n.10.

the showing of "actual prejudice" may vary depending on the underlying substantive claim. *Engle* v. *Isaac*, 456 U.S. at 129; *United States* v. *Frady*, 456 U.S. at 168. Here, the underlying claim is essentially equivalent to one of newly discovered evidence. Accordingly, it is entirely appropriate and consistent with this Court's decisions to apply the newly discovered evidence requirement of a probable effect on the outcome.

The court of appeals believed, however, that it would be unfair to require the defendant to bear the burden of showing a probable effect on the outcome, because he is in no better position than the prosecution to demonstrate whether the new evidence would be likely to alter the outcome. See Pet. App. A72. The court lost sight of the fact that it is the *defendant* who is seeking to have a valid judgment set aside because of the availability of new evidence he asserts should have been presented on his behalf at trial. There is nothing unfair in requiring him to demonstrate that there are sufficient grounds for doing so, by showing that the new evidence casts substantial doubt on the validity of the findings underlying that judgment; as we have explained, defendants routinely must carry this burden in newly discovered evidence cases. Conversely, because neither the prosecution nor the court is responsible for the alleged errors by defense counsel, it would be unfair to require, as the court of appeals has done, that the *government* bear the burden on the question of a possible effect on the outcome by demonstrating that counsel's errors were harmless beyond a reasonable doubt.

The only conceivable reason for not requiring a showing of probable effect on the outcome in this case—a reason eschewed by the court of appeals (Pet. App. A21 n.12)—would be that the evidence at issue here is relevant to the imposition of a sentence of death. This Court has stressed that the sentencing court must be free to consider all matters bearing on the defendant's character and record in such a case. *Lockett* v. *Ohio*, *supra*. But even if this unique and peculiarly sensitive factor places

the evidence at issue in this case in a special category for which the traditional newly discovered evidence standard is inappropriate, as in *Agurs*, the standard of prejudice nevertheless must be tailored to the interest in the justice and accuracy of the findings underlying the judgment that respondent seeks to have set aside. *Agurs*, 427 U.S. at 112. If the *Agurs* test were to be applied for this reason, the relevant inquiry would be whether the additional evidence creates a reasonable doubt about the validity of the judgment that otherwise would not exist. *Id.* at 113. It is clear that respondent is not entitled to relief even under this relaxed standard.

As the state trial court found on collateral review (Pet. App. A231), this was not a close case in which the balance might have been tipped in respondent's favor by additional evidence of nonstatutory mitigating circumstances, which are of secondary significance under Florida law (see page 10, *supra*) and which already were addressed to some extent in the plea colloquy and argument of counsel. The multiple aggravating factors in this case were "simply overwhelming" (Pet. App. A216), and, on collateral attack, the state courts and federal district court found no evidence of *any* statutory mitigating factors in connection with *any* of the murders (*id.* at A217-A218, A248-A250, A256, A286). The Florida trial court, on collateral review, explicity found "beyond any doubt" that "there is not even the remotest chance that the outcome would have been any different" if Tunkey had done the things respondent suggests (*id.* at A230), because "as a matter of law" the nonstatutory factors in mitigation would "be insufficient to outweigh the multiple aggravating circumstances" (*id.* at A231). The Florida Supreme Court, which reviews every death sentence to assure that the State's capital punishment statute is consistently applied, found "to the point of moral certainty" that respondent was not entitled to relief (*id.* at A250). Cf. *Barclay* v. *Florida*, No. 81-6908 (July 6, 1983), slip op. 17-18 (opinion of Rehnquist, J.).

These concurrent findings by the state courts, based on the application of state law, must be respected by the federal courts. And indeed the federal district court too found no "likelihood" or "significant possibility" that the balancing of aggravating and mitigating circumstances would have been altered if counsel had performed differently (Pet. App. A286). The judgment of the district court denying habeas corpus relief because of the absence of a showing of prejudice therefore should be reinstated.

II. THE DISTINCT QUESTION OF WHETHER THE ATTORNEY'S PERFORMANCE FELL MEASURABLY BELOW THE RANGE OF COMPETENCE DEMANDED OF DEFENSE COUNSEL SHOULD BE JUDGED, AS A THRESHOLD MATTER, BY AN OBJECTIVE STANDARD

Neither court below resolved the application to this case of the second necessary element of an ineffective assistance of counsel claim: whether the attorney's performance fell measurably below the range of competence demanded of defense counsel. Nor need this Court reach that issue, because, as we show in Point I, relief must be denied here in any event because respondent has failed to make the requisite showing of prejudice. We therefore shall make only a few brief observations regarding the second element.

In *McMann* v. *Richardson*, 397 U.S. 759 (1970), the Court did not attempt to give precise content to the proposition that relief may be granted in certain instances in which counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.[17] The Court instead concluded

[17] We also note that in *McMann* the issue on which counsel's advice was relevant in connection with the guilty plea—the possible use at trial of an allegedly coerced confession—itself implicated the fairness of the trial and the integrity of the truth-finding process. *Jackson* v. *Denno*, 378 U.S. 368 (1964). It does not follow from

that the matter for the most part "should be left to the good sense and discretion of the trial courts" (*ibid.*). In one respect, we believe this observation remains true: in a close case, judgment and discretion must play a role in the ultimate determination whether the defendant received a fair trial and reliable verdict in light of counsel's alleged shortcomings. But the close case is not the typical case. With increasing frequency, defendants attack their convictions by attacking their attorneys, often prompting a wide-ranging inquiry into counsel's litigating judgments long after memories have faded. Compare *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982). We have serious reservations about the wisdom of an approach that would require such an inquiry without compelling reasons.

Unduly intrusive, post-hoc scrutiny of the lawyer's strategy may require an unseemly probing of attorney-client communications and the attorney's thought processes, thereby dampening the ardor of defense counsel, undermining the sense of mutual trust in criminal cases generally, and perhaps discouraging lawyers from accepting appointments in criminal cases. Cf. *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947); *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983). A hearing such as that

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McMann that a conviction should be set aside if the assertedly incompetent advice of counsel in connection with a guilty plea concerned matters that do not raise those concerns, such as the admissibility of evidence allegedly seized in violation of the Fourth Amendment. Cf. *Stone* v. *Powell*, 428 U.S. 465 (1976). For the same reason, it would seem that the principles of *Stone* v. *Powell* may not be circumvented by asserting on collateral attack that the use at trial of evidence seized in violation of the Fourth Amendment resulted from counsel's incompetence. There may well be additional situations in which countervailing interests in finality, enforcing state procedural rules, or other factors foreclose relief even if the defendant shows that counsel's actions were outside the range of competence demanded of defense counsel and that he suffered prejudice as a result. See Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 Va. L. Rev. 927, 959-970 (1973); cf. *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976); *id.* at 514-515 (Powell, J., concurring).

held in district court in this case also places the attorney in the awkward position of defending himself while not wishing to harm his former client, and it places the prosecutor in the awkward position of defending the litigation judgments of his former adversary.

In many instances, this sensitive and awkward inquiry into counsel's litigation strategy can be pretermitted because application of the proper test of prejudice will make clear that relief cannot be granted whether or not the attorney acted with reasonable competence. Even where that is not so, however, the court should not embark upon a probing inquiry into the attorney's motives and strategy unless it is first shown that the attorney's performance fell outside an *objectively* discernible range of competence. For example, where the defendant asserts that his attorney committed a legal error at trial, such as failing to object to jury instructions, the defendant first should be required to show that the right involved was clearly established under controlling statutory or case law at the time of counsel's actions (*Harlow* v. *Fitzgerald*, *supra*, slip op. 14-18) and was of substantial importance to the case. Compare *Engle* v. *Isaac*, 456 U.S. at 130-134; *Jones* v. *Jago*, 701 F.2d 45, 47 (6th Cir. 1983).[18] A number of considerations in addition to avoiding unnecessary inquiry into counsel's litigating strategy support this requirement.

First, if the right involved did not clearly govern the conduct of criminal prosecutions at the time the defendant was tried, counsel's failure to assert that right does not in itself render the trial fundamentally unfair. Cf. *Engle* v. *Isaac*, 456 U.S. at 131. This conclusion is consistent with the central role of counsel in criminal cases of enabling the accused to meet the prosecution's case within the

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[18] Even then, it often may be unnecessary to require testimony by counsel regarding his actual reasons for pursuing a particular course if a plausible tactical basis reasonably may be ascribed to his actions. Cf. *Estelle* v. *Williams*, *supra*, 425 U.S. at 508; *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 96-97 (Stevens, J., concurring).

framework of existing procedures that ordinarily are too complex for an untrained layman to grasp. *United States* v. *Ash*, 413 U.S. 300, 309 (1973); *Powell* v. *Alabama*, *supra*, 287 U.S. at 60.

Second, given the subtleties of the art of advocacy, the uncertainties in the future course of the law (see *Harlow* v. *Fitzgerald*, *supra*, slip op. 17-18; *McMann* v. *Richardson*, *supra*, 397 U.S. at 771), and the inherent subjectivity of reviewing a lawyer's tactical judgments, an objective benchmark of attorney competence presents the most promising way of assuring some consistency and ease of application of the governing rules. Third, defining the range of competence in this manner as a threshold matter would allow sufficient latitude for counsel to exercise the independent judgment and freedom of action that the Constitution requires. *Polk County* v. *Dodson*, 454 U.S. 312, 318-319, 321-322 (1981). It also would best effectuate the "presumption that [counsel] was conscious of his duties to his clients and that he sought conscientiously to discharge those duties" (*Matthews* v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (Stevens, J.)).

Similar considerations apply where, as here, counsel's alleged errors relate to a failure to investigate and produce evidence, rather than to the handling of legal issues. Accordingly, the defendant should be required to show at the outset that the course he suggests counsel should have followed was equivalent, in its degree of obviousness and likelihood of proving fruitful, to the vindication of a clearly settled legal right that is of substantial importance to the defense of the case. The circumstances present in this case at the time of sentencing, objectively viewed, plainly disclosed no such obvious and substantial likelihood that material evidence would have been developed by the sort of investigation respondent now contends his lawyer should have undertaken. At least in the typical criminal case, the absence of such a likelihood should be a sufficient basis on which to reject

a claim that counsel's performance infected the trial with error of constitutional dimension, without the need for the sort of inquiry into counsel's actual litigation decisions apparently contemplated by the court of appeals' remand order. There is no need to consider whether the capital aspect of this case would suggest a different analysis, because it is in any event clear that respondent is not entitled to relief because of his failure to satisfy the independent prejudice prong of the ineffective assistance of counsel test.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals with directions to affirm the judgment of the district court.

Respectfully submitted.

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